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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

(1)

No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

T. J. WILLS,
Counsel for Petitioner.

152212

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SUPREME COURT OF THE UNITED STATES

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No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. T. Newton and Mrs. F. T. Newton, through their attorney, pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, directing it to send up the record in the above entitled cause, to be reviewed by this Court and such order entered therein as may appear from the record is mete and proper to be entered in said cause.

The Question Involved, Presented to This Court for Examination and Review and Correction

This is a bankruptcy proceeding. An involuntary petition was filed against the petitioners. There was a trial

before a jury and verdict for the petitioners. The court set aside the jury verdict and entered a judgment *non obstante veredicto.*

(a) An interpretation of the Act of Congress, Title 40, U. S. C. A., section 407.

(b) An interpretation and application of the Miller Act, Title 40, U. S. C. A., section 270 (a)-270 (b).

(c) An interpretation of the statute, Title 11, U. S. C. A., section 95.

(d) A construction of Title 11, U. S. C. A., section 21.

(e) An interpretation and application of the statute, Title 11, U. S. C. A., section 42.

Jurisdiction

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 20, 1945 (R. 1928) and a petition for rehearing was denied on August 10, 1945 (R. 1936). The jurisdiction of this Court is predicated upon Section 240a of the Judicial Code as amended.

History of the Case

F. T. Newton and F. S. Glenn were partners in the constructing business. In 1942 they were constructing projects for the United States Government and its authorized agencies as emergency work. They bid the contracts and furnished performance bond and a payment bond under the provisions of the Miller Act, Title 40, U. S. C. A., sections 270(a) and 270(b). When awarded a contract the partnership procured the money with which to do the work and effect its completion under the Assignment and Claim Statute, title 40, U. S. C. A., section 407. The assignment in each and every instance was to the Union Planters National Bank & Trust Company of Memphis, Tennessee.

On March 1, 1943 the partnership was dissolved. F. T. Newton paid to F. S. Glenn $80,000.00 in cash for his interest in the contracts under construction. The partnership agreement gave to F. T. Newton a two-thirds interest and to F. S. Glenn a one-third interest. Seven contracts had been taken by the partnership and were being performed under the partnership name of Newton & Glenn at the time of the dissolution. The funds necessary for the performance of the contracts were obtained under the Congressional scheme as expressed in section 407, title 40, U. S. C. A. The seven contracts totaled a construction obligation on the part of the government to pay the contractors $4,842,040.94. These contracts were all assigned to the Memphis Bank, and the Bank paid on the contracts $4,175,000.00, leaving a balance due unpaid by the Bank $667,049.90. On May 26, 1944, the Bank had received from the government by virtue of the government's acceptance of the assignments $4,312,580.76 (See record, page 318).

After the dissolution of the partnership F. T. Newton continued to operate as the F. T. Newton Contracting Company. He entered into about sixteen additional contracts with the government and assigned all of the government checks to the Memphis Bank. This assignment was made to procure the funds necessary for the construction of the projects. He took a contract for a project at Brunswick, Georgia, the construction price of which was $2,869,999.00. The payment of this contract was assigned to the Memphis Bank. However the Bank kept this contract separate from the other contracts and assignments that had been made by Newton. On October 16, 1943, after having paid to Newton $480,000 on the assignment of the Brunswick contract for $2,869,999.00, the Bank decided that it would not advance further money to Newton.

The scheme by which the Bank had operated was that it would purchase the contracts under the assignment and

deposit the monies arising therefrom by installments as Newton, the contractor, had need therefor in the payment of material and labor in carrying on the work. There was a provision in Newton's contract whereby the labor was to be paid in accordance with the Statute each week, and in default of any payment the employees or laborers would report for duty but would do no work and would be paid time and half time in what is denominated as "stand-by" time. There was also a provision in the contract that the government would cancel the contract, on ten days' notice, if the laborers were not paid each week. On the Bank's refusal to deposit to Newton's credit the monies necessary to meet the pay-roll and pay for material purchased in the interim, he defaulted and the contract was cancelled.

Under the Newton & Glenn contract there were three projects that had not been completed and final settlement made thereon—Bainbridge, Fort Myer, and Pascagoula. The contract price on these three projects was $711,614.71. The Bank had advanced $571,000.00 against its purchase price of $711,614.71, as above stated. At the time of the Bank's refusal to pay the remaining monies on the Brunswick job there was $65,000.00 of government checks that had not been received on the Newton & Glenn contracts. The Bank caled on Glenn to pay this $65,000.00 (see exhibit record page 330). Although the Bank held the assignment of the government checks to the amount of $711,614.71 and had received $510,000.00 from the government in checks so assigned as the work had progressed, the Bank insisted that Glenn owed this money and that he should pay.

In three of the contracts of Newton & Glenn, Newton had taken in as sub-partners with him in his partnership interest of Newton & Glenn, members of his family, among whom were Mrs. J. B. Edmonson, a sister of Mrs. Newton, and her husband J. B. Edmonson. The contracts of the sub-partnership appear in the record as exhibits 25, 26,

and 27, record pages 275-282. The first contracts entered into were for Camp Campbell, Tennessee; Greenville Flying Field, Mississippi, and Rohwer, Arkansas. These jobs having been completed, R. G. Wooten, a C. P. A., was employed to audit and determine the distributive shares of the Edmonsons in the profits thereunder. The audit showed that each were entitled to $52,049.79 (Record page 1174 et sequa).

The Newtons owned certain real property in the City of Hattiesburg, the greater portion of which is what is termed slum or low class property. The property had been bought from insurance companies who had loaned money on it and had to foreclose their liens. The Newtons bought on the installment payment plan. $85,000 was still due and a mortgage to secure the payment was held against the property. Newton negotiated with the Edmonsons and induced them to accept as their part of the distributive share of the profits in three contract jobs in which they were subpartners this rental property for the $104,000 coming to them and also the Edmonsons to assume the payment of the $85,000 indebtedness secured by a mortgage on the property. The deeds transferring the property to the Edmonsons were executed on August 23, 1943 and were placed of record October 6, 1943. This left the $104,099.59 in the Memphis Bank to Newton's credit.

The Memphis Bank refused to deposit to Newton's credit monies due on the assignment on the Brunswick job. The Bank claimed that Glenn was personally liable for the $65,000.00 covered by the government assignment of the Bainbridge, Fort Myer and Pascagoula jobs. The pressure they brought on Glenn resulted in Glenn associating with him the Creosoting Company of Hattiesburg, Mississippi; the American Sand & Gravel Company of Hattiesburg, Mississippi, and Edward Doughty in filing an involuntary petition against F. T. Newton and Mrs. Newton, alleging

that the Newtons were indebted to them and had committed an act of bankruptcy by deeding the property to the Edmonsons in lieu of the partnership funds earned by the Edmonsons in the partnership business. The accounts of the petitioning creditors other than Glenn, which has been heretofore explained, consists of material furnished on the job on which payment and performance bonds under the Miller Act were in effect.

At the time of the filing of the petition in bankruptcy there was in the Bank's possession as the proceeds of the contracts so assigned, but due, $3,400,000, in round numbers, in excess of the amount of the money that it had paid to Newton. The Bank, however, had paid almost $7,000,000 on these contracts and only $5,500,000 had been refunded to it by the checks of the government as the work progressed. The bonding companies had not paid out any monies and had not performed any duties imposed upon them by the surety obligation. The record shows that Newton owed no money except that which arose under the contracts entered into with the government for the construction of the projects above outlined.

The case was tried beginning the first day of June, 1944, before a jury, resulting in the jury returning a general verdict for the defendants, and answering three questions, with the second question sub-divided into four, all to the effect that the Newtons were not insolvent and had not committed an act of bankruptcy. The questions so propounded appear in this record, pages 1605, 1606 and 1607. On the trial of the case the defendants attempted to assert the claim of indebtedness due to them by the Bank on the balance due on the contracts. However, the court excluded the claim so offered. (See record pages 1555 and 1556.) At the time of the filing of the petition in bankruptcy there was $1,500,000 that the Bank had advanced on the twenty contracts that were practically completed,

for which the government had not made payments. The rule of the government was ten percent retainage until final acceptance of the contract. The court construed the Assignment and Claim statute so as to make this $1,500,000 that the government was obligated to pay to the Bank on the accepted assignment an indebtedness against Newton. The trial was had eight months after the petition in bankruptcy was filed, and it was shown that the amount of money that the Bonding Company had to pay in completion of the Brunswick and other contracts was $1,300,000, and in instructing the jury the court told them that they must take into consideration the two debts, one for approximately $1,500,000 and one for approximately $1,300,000 in determining the solvency or insolvency of the defendants. (See record, page 1604.) The only pertinent audit and figures introduced at all was introduced by the defendants, which is the DuMain audit. This audit showed that Newton's net worth on August 31, 1943 was $289,000. The evidence showed that nothing had happened to change his financial condition at the time the petition in bankruptcy was filed on November 3, 1943.

The trial of the case was before a jury; five of the jurymen were expert accountants. DuMain testifying as a witness, identified his audit, and gave supporting evidence to support each and every entry thereon. The DuMain audit showed that Newton on August 31, 1943, had a net worth of $289,000.00. Newton testified and his testimony as to the progress of the work and the material that had been purchased between August 31 and the date of the breach by the Bank had made better his position, so that his net worth was more at that time than it was at the date of the audit. The act of bankruptcy charged and relied on was the conveyance of the real property to Mrs. J. B. Edmonson as her and her husband's distributive

share of the profits from the contracts in which they were sub-partners.

The petition in bankruptcy was filed on November 3, 1943. On December 6, more than a month after the filing of the petition in bankruptcy, the Newtons sold $10,236.00 worth of electrical equipment that they had accumulated in the warehouse at Hattiesburg to be used on the contracts and which on the breach of the contracts had been transferred to New Orleans to be sold as critical material being used in war construction work. The sale of this property was alleged to be an act of bankruptcy and brought in by supplemental petition. It was sold, however, for a fair value and the money paid therefor. The petitioning creditors relied for their proof of insolvency on the claim that Newton owed to the Bank of Memphis the $1,500,000 covered by the government assignment on the twenty contracts practically completed and payment for which was then ready to be made by the contracting agencies of the government, and the anticipated costs to the bonding company of the completion of the jobs without credits therefor for the unpaid balance and the retainage held by the governmental agencies making the contract with Newton. The entire contract at Brunswick, Georgia for more than $2,800,000.00 had been assigned to the Bank and the claim was asserted and submitted to the jury that the $1,300,000.00 cost to the bonding company would be owed when and if the bonding company completed the contract. The court so instructed the jury. (See Court's instruction, record page 1604.)

The jury heard the evidence and weighed the testimony and documentary evidence submitted to them, and under the guidance of the instructions given by the Court returned a general verdict for the defendants and answered the questions propounded by the Court to the effect that the Newtons had not committed an act of bankruptcy and were

not insolvent on any of the dates that the Court conceived to be material dates, which were August 23, October 6, November 3, and December 6. The Court, however, on a motion to set aside the verdict of the jury and to enter a judgment *non obstante veredicto,* sustained the motion, set aside the verdict of the jury and entered a judgment adjudicating the defendants bankrupt.

In setting aside the verdict of the jury the court held that a conveyance of the real property to Mrs. Edmonson as her and her husband's distributive share of the profits in the three contracts was done for the purpose of concealing their assets and hindering, delaying and defrauding other creditors, and, therefore, was an act of bankruptcy. This holding by the Court in direct conflict with the finding of the jury was without support of any testimony in the record. The testimony shows without contradiction, that the sub-partnership agreement was made more than sixteen months before the cancellation of Newton's contracts, and more than twelve months before the Brunswick contract was entered into, and fifteen months before the audit was made showing the amount of partnership distributive shares for which the conveyance was made.

The Court held in direct conflict with the finding of the jury, that the $1,500,000.00 that the Bank had paid to Newton on the assignment of the government contracts and for which the government checks had not been received by the Bank, was an indebtedness owed by Newton, and held that the $1,300,000.00 estimated cost to finish the contracts for which the Bank held assignments but had not paid, was an obligation on the surety company and was, therefore, a debt owed by Newton to the surety company. The opinion of the trial Court setting forth his reasons for setting aside the verdict of the jury and the judgment entered thereunder, appears at record pages 1655-1658.

Court Misinterprets Section 407, Title 40, U. S. C. A.

The proper interpretation of the above section is that the assignment by the contractors to the Bank is a complete transfer and conveyance of all rights, titles and interests due to the contractor by the government to the Bank, for which the Bank pays the contract price less its agreed discount, at the time of the assignment. We interpret paragraph (a) of the statute to mean that the contractor can assign the funds represented by the government's obligation to pay on the completion of the contract when he has the written consent of the surety company for the assignment with the approval of the government through its proper agencies. The Bank on accepting the assignment owes the contractor the full amount of the contract price less the agreed discount, and the Bank would have no further interest in the matter except to receive from the government the checks issued in installments as the work progressed and the final check upon its completion and acceptance. Paragraph (b) of the Act makes the funds so received by the contractor trust funds; directs how they must be paid out and imposes a heavy penalty for the failure thereof. To make it certain that the statute would not be misinterpreted, paragraph (c) provides that nothing in the section shall be construed as imposing on the assignee (the Bank) any obligation to see to the property application of the funds so derived.

This Act was passed on June 16, 1933 as the effective date. It became the corner stone of congressional and executive action to effect a recovery of the nation from the depression into which it had sunk. The government was furnishing money and awarding contracts for public work and thereby furnishing employment to the millions of unemployed people in the country. No contractor, at least very few, could borrow the money to construct the projects

planned and promulgated by the government. The President and the Congress had to develop some means by which this money could be made available other than to pay it direct from the United States Treasury or the R. F. C., and they provided for the sale of the contracts to the Banks. The contract with a bond meeting the requirements for approval by the government was a guarantee that the project would be constructed and the cost thereof paid. Even the form of the bonds was changed by the Miller Act so as to guarantee to the government the result of a finished project fully paid for.

The surety company had to give its written consent because it was more vitally concerned than any other person other than the contractor himself. With this written consent of the surety company the contractor assigned to the Bank the contract and the Bank paid to the contractor the price represented by the contract. The Government owed the Bank in this instance the $1,500,000.00. The Bank had received value in the government's guarantee that the money would be paid to it. The Court in holding that the defendants in involuntary bankruptcy proceeding were indebted to the Bank was a misinterpretation of this statute and error. The Court has thus decided an important question of Federal law which has not been, but should be settled by this court. This is presented here for decision by this Court.

The Proper Construction of the Miller Act, Title 40, U. S. C. A., Section 270(a)-270(b)

The Miller Act was enacted by Congress more than two years after the passage of the Assignment and Claim statute *supra*. The Miller Act was enacted to cure weaknesses that were found in the administration of the scheme for lifting the country out of the depression.

Section 270(a) changed the law with reference to the bonds and provided for two bonds. It provides for a performance bond and for a payment bond. Section 270(b) provides for the protection of laborers and materialmen who work or furnish materials for the prosecution of the work to a completion of the job. These statutes were found necessary in order to give effect to the Assignment and Claim statute that was enacted in 1933 and became the bedrock foundation stone of all that has been denominated as the New Deal Legislation that saved America and made it the strongest financial and military nation of the world. These bonds made the materialmen and laborers secure in the payment of the labor performed and the materials furnished. They were not common creditors, but, if creditors at all, were secured by the bonds executed under the provisions of the Miller Act. Persons so secured as materialmen or laborers were not common creditors who could petition to put the contractor in involuntary bankruptcy.

Who May File a Petition in Involuntary Bankruptcy

Title 11, paragraph 95 provides that three or more creditors who have claims against any person which would in the aggregate be in excess of the value of securities held by them, if any, to $500.00 or over may file a petition in involuntary bankruptcy. The petitioning creditors, as is shown by this record, were Frank S. Glenn, who was not a creditor at all, and three laborers and materialmen who were secured under the provisions of the bonds executed in conformity with the Miller Act. When the proof of the plaintiffs was in and it was apparent that the petitioning creditors were protected by the Miller Act and the Claims and Assignment statute, the defendants moved the Court for a directed verdict (See record, page 1143). The Court overruled the motion because he was of the opinion that Title 11, U. S. C. A. Section 95, and the Miller Act could not

be so construed. Petitioners assert that his action of the Court was erroneous. The Circuit Court of Appeals sustained him, and petitioners assert that this was error, and that this Court should review and correct the interpretation so made.

The Court's Construction of Title 11, U. S. C. A., Section 21 Was Erroneous

The Court construed Section 21, Title 11, U. S. C. A. to permit the filing of supplemental and amended petitions setting up as acts of bankruptcy acts that were committed subsequent to the filing of the original petition in bankruptcy. The sale of the critical electrical material on December 6, 1943 was alleged as an act of bankruptcy and incorporated in the petition filed November 3, 1943. The appointment of a receiver to collect the rents from the Edmonsons' property was alleged as an Act of Bankruptcy. This Receiver was appointed months after the filing of the involuntary petition in bankruptcy on November 3. The receiver was a temporary one.

The Court permitted the introduction of testimony of audits made on May 30, 1944 of the condition of the contracts at that time, when they had not been completed and the government payments had not been made a credit. It was admitted, as the Court stated, for the purpose of showing the over-all picture. The Court's interpretation of this statute was error, which was approved by the Circuit Court of Appeals and should be corrected.

Jury Trials

Section 42, Title 11, U. S. C. A., provides that when an involuntary petition has been filed that the defendant is entitled to a trial by jury in respect to his solvency and in respect to any act of bankruptcy.

The Seventh Amendment to the Constitution of the United States provides that jury trials shall be in accordance with

the common law and that no fact in a trial by jury shall otherwise be examined in any court of the United States other than in accordance with the rules of the common law.

The testimony in this case showed (Record, page 354) that the contract held by Newton amounted to $10,615,028.12. That all of this contract value was duly assigned to the Union Planters National Bank & Trust Company of Memphis, Tennessee. It is shown in the audit, and this was introduced by the petitioning creditors (Record, page 354) that the Bank had paid on the purchase price $6,791,789.00, leaving a balance unpaid of $3,823,239.02 that the Memphis Bank owed to the contractors. Of this amount paid by the Bank to the contractor for the contracts so assigned, the government had lacked something approximating $1,500,000 of refunding to the Bank. The government payments were running behind the expenditures, and it was because of this fact that the Assignment and Claims statute was enacted in 1933 and the Miller Act enacted in 1935 to permit the contractor to obtain the funds sometime ahead of the obligation of the government to pay.

On October 16, 1943, when Newton asked the Bank for $225,000.00 of this over $3,800,000 due by the Bank to him to be used in the payment of laborers, the Bank declined to pay it and forced Newton to default in the payment of his laborers and forced the cancellation of the government contracts. If the interpretation of the statutes by the District Judge and approved by the Circuit Court of Appeals is correct, they make it possible to completely wreck and make bankrupt a man that was worth more than $300,000.00.

We do not think that the interpretation placed upon the Assignment and Claims statute, the Miller Act and Section 21 Section 95, Title 11, U. S. C. A., was correct.

The Court tried the case on the theory that the defendants owed the bank and that an indebtedness that would

accrue to the bonding company eight months thereafter would relate back to the date of the filing of the petition and that if it raised the presumption that the defendants were insolvent that they should be adjudged bankrupt. All of these questions were submitted to the jury and the jury found for the defendants. On a motion to set the verdict aside and the judgment entered thereon, the Court sustained it on his theory of the law, and especially his interpretation of the Assignment and Claims statute, the Miller Act and Section 21 and 95, Title 11 U. S. C. A. The Court in his opinion referred to, sets out the fact in effect that Newton had proven himself solvent and had exonerated himself from acts of bankruptcy and that the jury so found, but that the weight of the testimony was the other way and that he would set aside the verdict of the jury and enter judgment of adjudication.

We submit to the Court that the action of the trial judge was a misinterpretation of the statutes involved. That the proper interpretation of the statutes applicable to the facts in this case, as shown by the record, supported the verdict of the jury, and that the Court was in error in setting aside the jury verdict and entering judgment non obstante veredicto. That the Circuit Court of Appeals erred in approving and affirming the acts of the District Judge and was in error.

Prayer for Writ

WHEREFORE, Petitioners respectfully submit that this petition should be sustained and prays that a writ of certiorari may issue as is provided by law.

Respectfully submitted,

F. T. NEWTON,
MRS. F. T. NEWTON,

By T. J. WILLS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 395

BRIEF IN SUPPORT OF PETITION

Section 407, Title 40, U. S. C. A.

This Court, in so far as we have been able to find, has not passed on Section 407, Title 40, U. S. C. A.

The text of the statute is:

Assignments by Contractors: Approval: Application of Funds: Penalties

"(a) For the purpose of expediting the actual construction of public works contemplated by section 401-414 of this title and to provide a means of financial assistance to persons under contract with the United States to perform such construction, the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State Bank, or his claim against the United States, or any part of such claim, under such contract; and any assignment so approved shall be valid for all purpose, notwithstanding the provisions of section 15 of Title 41 and section 203 of Title 31.

(b) The funds received by a contractor under any advances made in consideration of any such assignment

are hereby declared to be trust funds in the hands of such contractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men in connection with the project, to the payment of premiums on the penal bond or bonds, and premiums accruing during the construction of such project on insurance policies taken in connection therewith. Any contractor, and any officer, director, or agent or any such contractor, who applies, or consents to the application of, such funds for any other purpose and fails to pay any claim or premium hereinbefore mentioned, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) Nothing in this section shall be considered as imposing upon the assignee any obligation to see to the proper application of the funds advanced by the assignee in consideration of such assignment."

This act was passed and became effective June 16, 1933. It is the foundation, bed rock for the entire plan of the economic recovery effected during the Roosevelt Administration.

The functions of the act were transferred to the Federal Works Agency effective July. 1st, 1939.

The Federal Government made available funds for the construction of public works, then for government projects. When the work was first started there was no sure plan of financing the contractors. It was not desired that the government would finance the projects direct. The wisdom of Congress and of the President was called into play to work out a sure and satisfactory plan. The statute under consideration was the result.

A contractor bidding on a job furnished 2 Bonds. One a performance bond that would guarantee that the project would be completed; the other a payment bond guaranteeing

that the completed project would be paid for. This protected the Government as to construction and payment. This act, with the government secures, permitted the contractor, with the written consent of the sureties, to assign the full contract funds to a Bank. The government accepted the assignment and paid the Bank when and as the monies became due by the government on and under the contract.

The assignment passed the title to the Bank. There was no obligation on the contractor to repay; no guarantee that the money would be repaid.

Appeal of Perry, 22 Pa. (10 Harris) 43-60 Am. Dec. 63.
Garretsie vs. *Van Ness,* 2 N. J. Law (1 Penning) 20, 2 Am. Dec. 333.

The contractor, with the written consent of the surety assigned the contract to the Bank, the government approved the assignment. The Bank owed the contractor the contract price less its discount. The government owed the Bank the full contract price. The contractor did not owe the Bank for any part of the funds so advanced. The contractor and his sureties owed the government the completed job.

The court in setting aside the verdict of the jury held that the contractor owed the Bank $1,500,000.00 that had been advanced in payment of the assigned contract. This was an error. The Circuit Court of Appeals affirmed the District Court and committed error.

The Petitioning Creditors Were Secured by Bond—"The Miller Act"

The contracts of the petitioner were covered by the bonds for the performance and payment. The petitioning creditors were not common or unsecured creditors. Glenn was not a creditor. He had paid the Bank by the assignment

of the contracts. The other petitioners' claims were, as material men and subcontractors, secured by the bond; and they were ineligible to join in an involuntary petition in bankruptcy. The court's action in over ruling defendant's motion to dismiss the petition was error.

Who May File a Petition in Involuntary Bankruptcy

The Bankruptcy Acts sets out who may file such a petition. Section 95—Title 11 U. S. C. A.:

Provides that three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to $500.00 or over may file a petition to have him adjudged a Bankrupt.

There were not provable debts shown not fully secured by the performance and payment bonds. The petition should have been dismissed.

Amendments Were Improperly Allowed

The Court allowed the petition to be amended by intervenors, and supplemental petition so as to bring in charges of acts of Bankruptcy alleged to have been committed subsequent to the filing of the original petition. The Circuit Court of Appeals said:

> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of the cause of action when the suit was started is a fatal defect which cannot be cured by the accrual of a cause pending suit."
>
> *American Bonding Co.* vs. *Gibson County*, 154 Federal Reporter, 871.

This case had been cited with approval by this Court in the case of U. S. for use of *Portland Cement Company* v.

McCord, 233 U. S. 157, 34 Sup. Ct. 550, Cited in *Eveland* v. *Detroit Machine Tool Co.*, 18 Federal (2nd) 968.

The action of the court in allowing the amendments to bring in alleged acts occurring subsequent to the filing of the petition and the admission of testimony of audits made to show conditions months after the filing of the petition was error.

The defendant's insolvency must be of the date of the acts alleged.

In Re *Ross & O'Brian Iron Works*, 58 Federal (2nd), 961.

In Re *Utrecht Coal Co.*, 63 Federal (2nd), 745.

Starfred Properties vs. *Ettinger*, 131 Federal (2nd) 575.

Jury Verdict Set Aside

The testimony was without dispute that the contractor had assigned to the Memphis Bank contracts of the Government to the value of $10,615,028.12 and that the Bank had advanced only $6,791,789.00 of the purchase price. The balance of the contract price was $3,823,239.02. The $1,500,000.00 that the Bank claimed the contractor owed it was included in the amount paid, shown above. The Du-Main audit showed he had a net worth of over $289,000.00.

The jury found for the defendants. They answered the questions asked by the court favorable to the defendants.

The Court should not have set the verdict aside and entered a judgment of adjudication.

Berry v. *United States*, 312 U. S. 450, 61 S. Ct. 637.

Jacob v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854.

Bailey v. *Central Vermont Railroad Co.*, 319 U. S. 350, 63 S. Ct. 1062.

Blair v. *Baltimore & O. R. Co.*, No. 265, October Term 1944, decided January 19, 1945, and appears in S. Ct. Advance Sheet page 545.

This Court is respectfully petitioned to have record certified up, and to reverse the Circuit Court of Appeals and the District Courts judgment.

Respectfully submitted,

T. J. WILLS,
Counsel for Petitioners.

(41)

FILED
SEP 29 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS C. HANNAH,
EDWARD P. RUSSELL,
M. M. ROBERTS,
Counsel for Respondent.

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The respondents respectfully represent and show to the court:

I

Objections to Sufficiency of Petition and Record for Writ of Certiorari

1. The petition does not conform to the requirements of Rule 38:

(a) In that under said rule a certiorari petition "shall be accompanied by a certified transcript of the record in the case." Only a part of the record has been filed in this court, there having been certified only the printed part of the rec-

ord which is substantially less than the whole record (R. 1-6).

(b) The petition does not conform to that part of said rule 38 which requires that "the petition shall contain a summary and a short statement of the matter involved"; and the supporting brief is not direct and concise.

(c) The petition does not assign "special and important reasons" for writ of certiorari as required by Rule 38 (5).

(d) There is total absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts and no important question of Federal Law is involved, and this Court is not concerned with questions not presented in the trial court or to the Circuit Court of Appeals of the Fifth Circuit.

2. The supporting brief does not conform to Rule 27 of this court in that a concise statement of the grounds on which the jurisdiction of the court is invoked is not furnished and neither is there a concise statement of the case containing all that is material to the consideration of the awkwardly presented questions, and with no page references to the printed record.

3. Findings of fact concurred in by the trial court and the Circuit Court of Appeals will be accepted by the Supreme Court unless clear error is shown and no such error exists in this record. This "two-court rule" operated as well upon consideration of applications for certiorari as in the decision of cases upon the merits. The trial court and the Circuit Court of Appeals in this cause were in accord on all issues of law and the findings of fact. The petition for writ of certiorari should be denied.

> "The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their

findings are not to be disturbed unless clearly erroneous." *United States of America* v. *Commercial Credit Company*, 76 L. Ed. 978, 268 U. S. 63.

"Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it." *Alexander, Administratrix, et al.* v. *Spencer Kellogg & Sons, Inc.*, 76 L. Ed. 903, 285 U. S. 502, 510.

"The Circuit Court of Appeals reexamined the findings in the light of the evidence and accepted them. It must be a strong case in which this court will set aside these concurrent findings of two courts. We think this is not such a case." *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company*, 88 L. Ed. 721, 321 U. S. 275, 278.

"Some of these findings have been challenged. But we do not stop to examine the evidence. We accept those findings, as they were concurred in by two courts and no clear error is shown." *Anderson* v. *Abbot, et al.*, 88 L. Ed. 793, 321 U. S. 349, 356.

II

Response Proper to Petition for Writ of Certiorari

The Acts of Congress Allegedly Involved

The questions allegedly involved in the petition for writ of certiorari have no application, as we view it, to the trial and judgment upheld by the Circuit Court of Appeals for the Fifth Circuit. As a preface to the identity of the questions presented, petitioners contend that the court set aside the jury verdict and entered judgment non obstante veredicto. However, the trial court only permitted the application of Rule 50(b) of Rules of Civil Procedure of District Courts of the United States. We shall deal with the questions in the order identified by petitioners and under identical

headings. Petitioners seek interpretation of (a) Title 40, Section 407, U. S. C. A., (b) Title 40, Section 270(a) and 270(b), U. S. C. A., (c) Title 11, Section 95, U. S. C. A., (d) Title 11, Section 21, U. S. C. A., and (e) Title 11, Section 42, U. S. C. A.

"History of the Case"

The petition under heading above mixes law and facts and erroneously pictures the existing record of facts and the law applicable thereto.

Petitioners were interested with F. S. Glenn in building of military reservations and housing projects prior to March 1st, 1943. Thereafter F. S. Glenn withdrew from the business, and with approximately twenty-three Government contracts scattered in six southern states there was failure to meet payrolls on October 16th, 1943 (R. 382). On November 3rd, 1943, the original petition in bankruptcy was filed with two intervening petitions filed by the same attorneys on November 5th and November 15th of 1943, and wherein there were involved the first and second Acts of Bankruptcy (R. 8-21). Subsequently a number of intervening petitions were filed down to February 5th, 1944, when an amended and intervening petition was filed after court approval was first had and obtained and which petition identified six creditors with claims aggregating approximately $100,000.00 (R. 89-98), and the order authorizing the amendment had approval of petitioners in words as follows:

> "The undersigned of attorneys of record for the parties identified as debtors hereby waive service of process and approve the foregoing form for order and agree to file their answer to the petition on or before ten days from this date.
>
> "Dated this fifth day of February, A. D., 1944.
>
> "T. J. Wills,
> Of Attorneys".

(The foregoing agreement to court order omitted by agreement from printed record. R. 100.)

The trial began on June 1st, 1944, and consumed more than three weeks and resulted in a printed record in three volumes with more than nineteen hundred pages and with a substantial part of the record omitted as disclosed through pages 1 to 6, inclusive, of record. Petitioners correctly state on pages 7 and 8 of their petition on file herein that there was included in their debts and obligations the $1,500,000.00 due the Union Planters Bank and Trust Company of Memphis, Tennessee, and $1,300,000.00 due the Maryland Casualty Company and the National Surety Corporation for monies paid to satisfy claims of labormen and materialmen (R. 1755 and 571-2). The $2,800,000.00 due and unpaid by petitioners did not include $150,000.00 stand-by payroll (R. 571-2), and it did not include approximately $150,000.00 of unpaid Federal taxes (R. 1131), and approximately $200,000.00 to common creditors in addition to the approximately $100,000.00 of unpaid claims represented by petitioning creditors in petition, aforesaid, of February 5th, 1944. The only available monies to cover this total indebtedness of more than $3,000,000.00 was the money to be received from the Government of the United States under several contracts and amounting to less than $1,007,000.00 (R. 572).

The only testimony in the record which would attempt to deal with solvency is that of the Dumain audit which does not attempt to show the status of the petitioners other than on August 31st, 1943, and he admitted that on bank balances alone the books showed approximately $800,000.00 more than petitioners actually possessed as of August 31st, 1943 (R. 1361-1374).

We invite this court to review the testimony for petitioners, which testimony includes refusal of both petitioners to testify on ground that their testimony "might tend to

incriminate'' them. Sixty pages of the record is made up of that kind of testimony (R. 1833-1872 and 1872-1890). They claimed payment of $40,000.00 as attorneys' fees (R. 608). They gave away all Government Bonds and life insurance (R. 601). They obtained $30,000.00 in cash from a brother-in-law after the default (R. 612). They moved their remaining property away in the night time and sold it to a friend for about $10,000.00 (R. 615). They deeded to their sister and sister-in-law $451,100.00 of property to satisfy an old debt of approximately $52,000.00 (R. 1133 and 1134). Testimony through a period of three weeks covered similar transactions where property was dissipated and at a time when petitioners admitted they had no property or money with which to pay their debts (R. 402 and 537). Justice and right required the result which is being attacked by petitioners.

Four Acts of Bankruptcy were pleaded with no new or novel applications of law and with questions of fact not denied and resolved in favor of respondents by the trial court and the Circuit Court of Appeals. On sustaining the motion for judgment under said Rule 50 (b) the trial judge gave forceful opinion in writing (R. 1655-58). The Circuit Court of Appeals for the Fifth Circuit reviewed the record and concluded against petitioners with announcement that, ''Viewing the evidence in the light most favorable to the appellants, and accepting as true all competent evidence in their behalf, we think the requested peremptory instruction to find for the plaintiffs should have been granted'' (R. 1917).

''Court Misinterprets Section 407, Title 40, U. S. C. A.''

The foregoing heading appears on page 10 of petition, but the law there identified has no application whatsoever. Paragraph 402 thereof states the purpose of the Act to be in part: ''Construction, repair, and improvement of pub-

lic highways and parkways, public buildings, and any publicly owned instrumentalities and facilities; conservation and development of natural resources," etc. Paragraph 401 thereof states in part: "After the expiration of two years after June 16, 1933, or soner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 701 of Title 15 has ended, the President shall not make any further loans," etc. And Paragraph 407, identified by petitioners, provides in part: "For the purpose of expediting the actual construction of public works contemplated" by the program "the President is authorized and empowered, through the Administrator" * * * "to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, or his claim against the United States, or any part of such claim, under such contract," etc.

The foregoing Act must be dismissed from consideration because the projects here involved were let by the United States to these bankrupt contractors after 1940 and admittedly were a part of our preparation for war and the national defense as shown by the assignments to said bank about which there is not the slightest dispute. There was involved an Act not identified by petitioners, being the Assignment of Claims Act of 1940 appearing in 31 *United States Code Annotated*, paragraph 203. Prior to 1940 this statute provided that all assignments of any claim upon the United States "shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," etc. This statute was passed in 1908 to protect the United States against con-

flicting claims arising under assignments and to absolutely prevent assignments until after the claim against the United States had been determined in amount and allowed.

With the approach of war, Congress, in 1940, amended the Act to make it possible for contractors doing work for the United States to assign "to a bank, trust company, or other financing institution" * * * "all amounts payable under such contract" so that contractors could be financed quickly and the nation prepared for the oncoming war. This Assignment of Claims Act of 1940 is the act under which the contractor executed to said bank the various assignments involved (R. 314). However, petitioners have not mentioned this act, but they have selected a totally unrelated act for discussion and requested the court's interpretation thereof.

Under said Assignment of Claims Act of 1940 and the contracts with the United States the contractor was entitled to progress payments at intervals equal to ninety percent of the value of the work done and materials delivered on the project. The assignee bank was under no obligation to lend the contractor unlimited amounts, but only such amounts as the bank felt it could safely lend. It was the conduct of the contractor, his inefficiency in management, the chaotic confusion of his affairs, books and records, the undisclosed and secretive conveyances made by him of all of his assets and other similar factors which caused an investigation and a refusal by the bank to make further loans (R. 1678-1823). The investigation made by the bank and others revealed all of the irregularities detailed in the record. It revealed that the liabilities of petitioners exceeded their assets by approximately $2,000,000.00 and it also revealed that the Newtons had reduced to cash their liquid assets and discontinued the use of banking institutions for the carrying on of their business;

and the contractor defaulted with the Government on October 16, 1943.

"The Proper Construction of the Miller Act, Title 40, U. S. C. A., Section 270(a)-270(b)"

The petitioners call for an interpretation of these statutes commonly known as the Miller Act. There is nothing complex about the statutes. They have been before the courts many times and have been construed so often that they are settled law. There are involved payment bonds. Under paragraph 270(a) Title 40, *United States Code Annotated,* it is provided that a bond or bonds shall be furnished where the contract with the United States exceeds $2,000.00. The bond protects "all persons supplying labor and material in the prosecution of the work provided for in said contract." Paragraph 270(b) of said law provides for a delay of ninety days after the last labor was performed or materials furnished before suit on the payment bond. In the matter in controversy few suits were filed, but the surety companies on the bonds paid in excess of $1,300,000.00 to labormen and materialmen.

"Who May File a Petition in Involuntary Bankruptcy"

It is true that the defendants on the trial moved the court for a directed verdict (R. 1143). However, that motion did not assert the apparent contention of the opposition that the petitioning creditors were protected by the Miller Act. In fact the Miller Act in most cases did not apply in favor of petitioning creditors. The amended petition of February 5th, 1944, of George A. Shaper and five others represented claims of approximately $100,000.00 and none of said petitioners were affected or protected by the Miller Act other than the Bailey Lumber Company with claim of approximately $1200.00. We fail to see or understand the application attempted to be made.

"The Court's Construction of Title 11, U. S. C. A., Section 21 Was Erroneous"

The First, Second, Third, and Fifth Acts of Bankruptcy were pleaded in the amended petition of February 5th, 1944, filed by George A. Shaper and others, and the Honorable T. J. Wills, of attorneys for petitioners, approved the order authorizing the amendment and consented to the filing thereof (R. 100). The original and amended petitions filed prior to February 5th, 1944, covered the First and Second Acts of Bankruptcy. The trial court and the Circuit Court of Appeals concluded that all four acts of bankruptcy applied against petitioners. The Circuit Court of Appeals said of this that, "The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish prima facie all the acts of bankruptcy charged in the amended and supplemental petitions. Substantial evidence in contradiction thereof, especially in contradiction of that evidence tending to show defendants' insolvency, was necessary to create an issue of fact for the jury. Such evidence was not produced, although the facts as to their solvency were peculiarly within the knowledge of the defendants" (R. 1917).

"Jury Trials"

Under the authority of Section 42 Title 11, *United States Code Annotated,* the petitioners as defendants requested trial by jury and the jury trial was afforded them. The case was submitted to the jury after the close of the evidence and after respondents had moved for a directed verdict in their favor, resulting in jury verdict for the defendants. Thereupon and under authority of Rule 50 (b) of the Federal Rules of Civil Procedure and within ten days

after verdict, respondents filed motion for judgment which was sustained. The trial court had concluded that the defendants had furnished no evidence to create a question of fact for determination by the jury and that the petitioners had furnished sufficient of testimony to establish all the acts of bankruptcy charged in the original and amended and supplemental petitions. The Circuit Court of Appeals for the Fifth Circuit held that when the evidence was viewed in its most favorable light to the bankrupts "the requested peremptory instruction to find for the plaintiffs should have been granted" (R. 1917). If the books of petitioners had not been out of balance $800,000.00 in their favor as to cash on hand in banks (R. 1361-74), and if petitioners had not owed more than $3,000,000.00 with only $1,000,000.00 of assets to come from the Government on contracts at a time when they had no money or other property or if petitioners had been able to furnish facts to show solvency or to answer simple questions without complaint that to answer may tend to incriminate them, a question of fact may have been created for the jury, but the petitioners have themselves wholly failed in every particular and no issues of fact appeared in the record for jury consideration.

The petition is difficult to answer because the major questions have to do with Federal Statutes not applying either directly or indirectly to the rights of the parties. The petitioners insist that a proper interpretation of the Federal Statutes identified require the result that (a) when the contractor executed the assignments to the bank, it became liable to the contractor for the full amount of the project contract price, and that the bank was then obligated to pay to the contractor regardless of the extent of the progress with the project; and (b) upon the execution of the assignment by the contractor to said bank the United States immediately became indebted to the bank for a like

amount which the United States was obligated to pay; and (c) the bonding companies which executed the performance and payment bonds were obligated to pay all the contractor's debts to sub-contractors and labormen and materialmen in addition to performance of the project contract and without any exposure to the contractors because of default or failure. The substance of the argument is that when the contractor defaulted, the bonding companies were obligated to pay approximately $1,300,000.00 to labormen and materialmen, and the United States was obligated to pay $1,500,000.00 to the bank and the contractor would not have any exposure because of said payments and would not be liable therefor and solvency would thereby be established. In view of all of the above respondents seek a denial of the petition at the cost of petitioners.

III

Argument for Respondents

Section 407 Title 40, United States Code Annotated

The opposition correctly quotes the law above identified which became effective on June 16th, 1933. However, as pointed out in our answer to petition this act related to the Federal Emergency of 1933; and the projects here involved were let by the United States to these bankrupt contractors after 1940 and admittedly were a part of the national defense program. We, therefore, are at a loss to understand why petitioners and their counsel inject into the discussion the Act of 1933 dealing with the depression of those years and the assignments permissible under that Act. As pointed out in response to petition, the Assignment of Claims Act appearing as paragraph 203, Title 31, *United States Code Annotated* was the basis and controlling law for the assignments here involved (R. 314). This Assignment of Claims

Act of 1940 has been construed by the courts, including the Circuit Court of Appeals for the Fifth Circuit, and this court.

> "Section 203, supra, prior to its amendment on October 9, 1940, provided that all assignments of any claim against the United States of the nature here involved should be absolutely null and void unless, along with numerous other requirements, the assignment of such claim was made after such claim had been allowed, the amount due ascertained, and a warrant for the payment thereof issued. The amendment of October 9, 1940, as counsel for both sides admitted in oral argument, was made for the purpose of aiding contractors in financing national defense contracts. The amendment eliminated the provisions against assignments in any case in which the monies due or to become due from the United States, or from any agency or department thereof, aggregating $1,000.00 or more were assigned to 'a bank, trust company, or other financing institution, including any Federal lending agency', but requiring, in the event of any such assignment, that the assignee thereof should file written notice of the assignment, together with a true copy of the instrument of assignment." * * *
>
> "In addition to protecting the Government, which was the prime purpose of the section before its amendment, as construed in *Martin* v. *National Surety Co.* 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the amendment of 1940 had the incidental effect of protecting that assignee who filed his assignment and gave notice under the provisions of the statute." *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company,* 149 Fed. 2nd 73 (May 17, 1945, 5C).

"The Miller Act"

It is agreed by all that the contracts of the petitioners were covered by performance and payment bonds required under paragraphs 270(a) and (b), Title 40, *United States Code Annotated.* It is not true that the petitioning creditors were not common or unsecured creditors. Some of the peti-

tioning creditors received some or all of their money from the surety companies, but most of the creditors, as shown by the testimony, were common or unsecured creditors and have not yet been paid. At the time of the trial it was agreed that the claim of the Gulf States Creosoting Company was in the sum of $218.19 and of the American Sand and Gravel Company of $565.08 (R. 180), and of Contractor Material Company in the sum of $830.08 and $166.64 (R. 181), and of the Hermitage Portland Cement Company in the sum of $602.50 (R. 215), and of Bailey Lumber Company in the sum of $1,205.61 (R. 216), and of Brick & Tile Company in the sum of $430.00 (R. 217), and of the Massachusetts Bonding and Insurance Company in the sum of $3,674.07 (R. 217), and of Associated Indemnity Corporation in the sum of $5,343.39 (R. 1831). There was no substantial dispute as to amounts of claims of any of the petitioning creditors.

"Who May File a Petition in Involuntary Bankruptcy"

The Bankruptcy Act through Section 95, Title 11, *United States Code Annotated* sets out who may file such a petition. Where the creditors are more than twelve, three or more creditors who have provable claims amounting to $500.00 or over may file a petition. In this case there were eight petitioners who had claims aggregating more than $13,000.00 as hereinbefore set forth. The last of these claims above listed where agreement was had is that of the Associated Indemnity Corporation and after naming the amount, it was stipulated and agreed that the "indebtedness was past due and owing prior to and at the time of the filing of the petition in bankruptcy, and remains unpaid" (R. 1831). Similar agreements were had respecting other claims of petitioning creditors. There is no foundation for the statement that the petition should have been dismissed because the claims of petitioning creditors were not provable debts.

Paragraph 95 (f) of said Title 11 provides that "Creditors other than the original petitioners may at any time enter their appearance and join in the petition."

> "Under Bankruptcy Act * * * an intervening petitioner may be counted to make up number of creditors to support involuntary petition." Syllabi 2, *Seifred vs. Firestone Tire and Rubber Company, et al.*, (C. C. A. 1st Circuit) 4 Fed. 2d. 305.

"Amendments Were Improperly Allowed"

The amendment about which complaint is now made is that of February 5th, 1944 (R. 89-99). Court approval for the filing of said amendment was entered and based upon an approval of said order which was made a part thereof. The order appears at pages 99 and 100 of the record. The agreement was not copied into the printed record, but it has been furnished above just as it appears in the original record at page 194. Item 14 on page 2 of this record shows that the waiver of defendants was omitted from the printed record; but the attorneys of record for the defendants approved the form for order and agreed to answer the petition in ten days without process being issued or served. That amendment covered Acts 1 and 2 of Bankruptcy just as covered in the original petition and in all previous amendments. Even if the attorney for the defendants had not agreed to the amendment, it all becomes a moot question since the adjudication must be had on either or both of the First two Acts of Bankruptcy. In the early history of the bankruptcy law of the United States a Federal District Court held that a good objection had existed, but that the objection was made too late to take advantage thereof. *In Re Cliffe*, 94 Fed. 354. If there existed some irregularity in the amendment of February 5th, 1944, it was waived when the attorney agreed to the court order authorizing the amendment and approved the same and thereafter filed answer thereto and in the

answer raised no objections to the amendment and sought a jury trial thereon (R. 103-109). The amendments were allowed with the approval of the defendants and on order of the court and no objections were made thereto in the subsequent pleadings, and the late objections thereto only tend to confuse and constitute basis for delay.

We deny that the defendants' insolvency must be of the date of the acts alleged. It was on October 16th, 1943, when Newton defaulted with the Government. He created no debts after that date, according to his own testimony, and at that time he owed the bank or banks $1,500,000.00 and when the surety companies got through paying for labor and materials he had placed on the jobs prior to that time, he owed them $1,300,000.00. None of the petitioning creditors or other creditors asserting claims against the defendants made sales to them after October 16th, 1943. It is true that the surety companies did not know exactly what they would have to pay as of October 16th, 1943, when the Newtons defaulted with the Government, but claims were asserted and proved and paid in the amount aforesaid. In view of the fact that the original and amended petitions down to February 5th, 1944, all involved the First and Second Acts of Bankruptcy and since the amendment of February 5th, 1944, was filed with consent of the defendants and answered without process and objections, said amendments were entirely proper and so considered by the trial court and the Circuit Court of Appeals.

Petitioners are in error in claiming that the defendants' insolvency must be as of the date of the acts alleged. They identify the cases of *In Re Ross & O'Brian Iron Works,* 58 Fed. 2d, 961; *In re Utrecht Coal Co.,* 63 Fed. 2d. 745, and *Starfred Properties* v. *Ettinger,* 131 Fed. 2d. 575, in support of this contention. The first case mentioned was decided by the Circuit Court of Appeals for the Second Cir-

cuit in 1932 and involved only alleged preferential transfers. The second case arose with the same Circuit as did the third case mentioned and involved the same subject matter. Under paragraph 21, Title 11, *United States Code Annotated*, as amended, and under paragraph (b) of said amendment it is provided that, "For the purposes of this section, it is sufficient if intent under the first act of bankruptcy or if intent or insolvency under the second act of bankruptcy exists either at the time when the transfer was made or at the time when it became perfected, as hereinabove provided." In this connection it must be remembered that the first act of bankruptcy does not depend upon insolvency and insolvency does not have to be pleaded or proven. The only time when a date becomes important under the First Act of Bankruptcy is when the defendant seeks to plead and prove solvency as of the time of the filing of the petition against him. The Federal Statute on this phase of the matter is as follows:

> "It shall be a complete defense to any proceedings under the first act of bankruptcy to allege and prove that the party proceeded against was not insolvent as defined in this title at the time of the filing of the petition against him. If solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed. In such proceedings the burden of proving solvency shall be on the alleged bankrupt." Paragraph C, Section 21, Title 11, *United States Code Annotated.*

The fraudulent conveyances were dated August 23rd, 1943. They were recorded October 6th, 1943, and as of that date under the Mississippi law became perfected as between the parties and the original petition in bankruptcy was filed on November 3rd, 1943. The material dates as to the first and second acts of bankruptcy are the three dates last above mentioned. The amendment of February 5th, 1944,

brought in the date of December 6th, 1943, as applied to the first and second acts of bankruptcy because it was on December 6th, 1943, when the remainder of the property of petitioners was conveyed away to their General manager, J. B. deVillentroy (R. 1656). The bankruptcy court is a court of equity, and the court may consolidate voluntary and involuntary petitions for trial. *International Silver Company, et al.* v. *New York Jewelry Co., et al.*, C. C. A. 6th Cir., 233 Fed. 945.

The amendment now complained of was authorized by agreed court order and was answered, as aforesaid, without objections thereto. Even if the amendment might have been objectionable the conduct constituted waiver. *Leidigh Garage Company, et al.* v. *Stengel, et al.*, 95 Fed. 637, C. C. A. 6th Cir.; *Chicago Motor Vehicle Company* v. *American Oak Leather Company, et al.*, C. C. A. 7th Cir., 141 Fed. 518.

"Jury Verdict Set Aside"

The petitioners closed their argument with statement that the bank had advanced $3,823,239.02 less than the total contract values between petitioners and the Government. They recognized the debt due the bank of $1,500,000.00 and then they state that the Dumain audit showed a net worth of $289,000.00 and indicate that this would create a question of fact for the jury. The fallacy of this argument as recognized by the trial court and the Circuit Court of Appeals is that the Dumain audit was made to show net worth as of August 31st, 1943, at a time when the books could not be relied upon, according to Dumain, and at a time when the books showed that petitioners had $800,000.00 in the several banks more than they actually possessed (R. 1361-74). The Dumain audit had no probative value. Petitioners admitted that they had no money and did not know where they stood. They simply failed to furnish testimony in contradiction of the prima facie

case made against them. The trial court and Circuit Court of Appeals had no election but to require adjudication in bankruptcy. Under Section 42, Title 11, *United States Code Annotated*, petitioners were entitled to a trial by jury; but petitioners failed to create issues of fact for determination. The same rules for direction of verdict apply in bankruptcy cases as in other cases involving jury trials. *In Re Ironclad Manufacturing Company*, 197 Fed. 280, C. C. A. 2nd Cir.

Conclusion

The trial court and the Circuit Court of Appeals have committed no error. The Circuit Court of Appeals has not decided "an important question of local law in a way probably in conflict with applicable local decisions;" and it has not decided "an important question of Federal law which has not been, but should be settled by this court." We submit that the petition for writ of certiorari is not well taken and should be denied.

Respectfully submitted,

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